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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

JURISDICTIONAL STATEMENT

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Dated: October 18, 1965

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UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, was handed down on June 22, 1965, in *Great Coastal Express, Incorporated, et al.* v. *United States, et al.*, Civil Action No. 4205. It and the final order in favor of defendants are appended hereto as Appendices A and B respectively.

The report and order recommended by Lewis W. Sornson, Hearing Examiner of the Interstate Commerce Commission, and served under date of April 3, 1964, in *Great Coastal Express, Incorporated—Purchase—Price Transfer Company, Inc.*, Docket No. MC-F-8338, is appended hereto as Appendix C, and the Decision and Order of the Interstate Commerce Commission dated December 14, 1964, pursuant to which the report and order of the Hearing Examiner became administratively final, is appended hereto as Appendix D.

The recommended report and order of the Hearing Examiner adopted by the Decision and Order of the Interstate Commerce Commission prompted the filing of the cause below.

JURISDICTION

The complaint below was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321 through 2325, inclusive, to set aside and annul the Decision and Order of the Interstate Commerce Commission dated December 14, 1965, denying approval of the purchase by Great Coastal Express, Incorporation [Great Coastal], of certain motor carrier operating rights belonging to Price Transfer Company, Inc. [Price Transfer]. When the Decision and Order of the Interstate Commerce became administratively final, the matter was appealed by Great Coastal and Price to a special Three-Judge District Court in the United States District Court for the Eastern District of Virginia, Richmond Division.

The decision and final order of the Three-Judge District Court was entered on June 22, 1965, after which Notice of Appeal to the Supreme Court of the United

States was filed in that Court by these appellants on August 20, 1965.

The jurisdiction of the Supreme Court to review this decision upon direct appeal is conferred by Title 28 U.S.C. §§ 1253 and 2101 and is sustained by the following decisions: *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173 (1959); *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73 (1960); *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1 (1960); and *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertaining to this proceeding are as follows:

Requirement of Approval of Purchase of Motor Carrier Properties

Section 5(2)(a) of The Interstate Commerce Act [49 U.S.C. Section 5(2)(a)]

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—(i) for two or more carriers to consolidate or merge their properties or franchises or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; * * *."

Basis For Approval

Section 5(2)(b) of The Interstate Commerce Act [49 U.S.C. Section 5(2)(b)]

"* * * If the Commission finds that, subject to such terms and conditions and such modifications

as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *."

Judicial Review

Section 10(e) of The Administrative Procedure Act [5 U.S.C. Section 109(e)]

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute * * *."

THE QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. May the Interstate Commerce Commission in determining whether a proposed purchase of motor carrier operating rights is consistent with the public interest properly reject an application for approval of the purchase on the ground that a joinder of operations, as proposed, would bring into being a new competitive service, when in fact, and as specifically found by the Commission, the competitive service was brought into being by a joint-line arrangement between transferor and transferee nearly eight months prior to the time the purchase contract was negotiated and signed?

2. May the Interstate Commerce Commission, which has consistently considered a merger of franchises enabling institution of a new competitive service to be adverse to the public interest, and which in this regard has traditionally required applicants for approval of franchise purchases to meet their burden of proof by submitting for analysis data concerning the nature of venor's operations during the six month period prior to application or execution of the sales contract, abruptly and precipitously adopt as controlling said new service issue a new and different standard, namely, the nature and extent of vendor's operations during a period of nearly eight months prior to execution of the contract of sale, without giving any reasons whatsoever for adoption and application of said new standard?

3. Did the Interstate Commerce Commission act arbitrarily and capriciously in adopting a new standard without explaining its reasons for doing so; did the Interstate Commerce Commission reach its ultimate conclusions on grounds which are not supported by substantial evidence and are so ambiguous and conflicting as to fall short of requirements of law; and did the Court err in sustaining the Commission and dismissing the complaint filed herein?

STATEMENT OF THE CASE

It is the position of the appellants (a) that the Interstate Commerce Commission arbitrarily and therefore unlawfully departed from its traditional standard and, without stating its reasons, applied a new and different standard or test in reaching its disposition of this case, (b) that the recommended report is so replete with ambiguity and conflicting statements that it fails to provide for a reviewing court adequate

grounds to support the ultimate statutory conclusion; and (c) that the District Court below erred in sustaining the Commission in its wrongful action.

Great Coastal is a motor common carrier engaged in the transportation of general freight in interstate and foreign commerce over irregular routes between points in an area extending generally from Baltimore, Md., to New York, N. Y., on the one hand, and, on the other, points in some 28 Virginia counties, including James City County. The latter county is situated west of and contiguous to Newport News, Va., a part of the Hampton Roads complex.

During, and prior to 1961, Great Coastal confined its operations largely to service between the New York-Philadelphia (Pa.)—Baltimore area, on the one hand, and, on the other, Richmond, Va., and other points within the aforesaid 28 county area. It did not participate in the transportation of any significant volume of traffic originating at or destined to points in the Hampton Roads complex. To do so, it was necessary to join with some other carrier authorized to serve the area, since Great Coastal had no rights of its own south and east of James City County.

Price Transfer at all times material hereto was a common carrier by motor vehicle performing authorized operations in interstate and foreign commerce in Norfolk, Newport News, Portsmouth and other points throughout the Hampton Roads area, with authority from the Interstate Commerce Commission extending into and overlapping a portion of the authority of Great Coastal in James City County. The overlap enabled appellants lawfully to perform a joint, through service.

In February, 1961, ownership of Price Transfer stock changed hands. In November, 1961, the new management of Price Transfer approached C. E. Estes, owner of Great Coastal, with the suggestion that the two carriers by virtue of their respective authorities could, at a point in James City County, engage in the interchange of freight destined to Norfolk and nearby points, thus enabling Great Coastal to enter the Hampton Roads trade. Acting upon this offer, Great Coastal entered into an interchange arrangement with Price Transfer and commenced interlining shipments with Price to and from the Norfolk area in April of 1962. Service under the joint line arrangement was performed continuously until June of 1963, and, as hereinafter explain, by Great Coastal after that time under an approved lease arrangement.

While these events were taking place, Price experienced financial difficulties which became more critical with the passage of time. The financial problems induced Price Transfer stockholders to enter into negotiations with another carrier, Davidson Transfer & Storage Company, looking toward the sale to that company of a controlling stock interest in Price Transfer. However, these negotiations were terminated in October, 1962. Because of the aforementioned interline arrangement, the stockholders of Price Transfer then turned to Great Coastal with a proposal to sell the Price Transfer operating rights. The ensuing negotiations resulted in a contract for sale which was signed on November 29, 1962, nearly eight months after the commencement of the interline arrangement described above. Approval of the purchase was sought under § 5(2) of the Interstate Commerce Act by application submitted to the Commission on the form BMC-44 prescribed by said Commission.

Continuing decline in the financial condition of Price Transfer prompted an application to the Interstate Commerce Commission by Great Coastal seeking authority under § 210a(b) of the Act to lease the Price operating rights temporarily, pending disposition of the purchase application. The temporary authority request was at first denied, but on reconsideration was granted, based on a finding that failure to grant such approval might result in the destruction of or injury to the Price Transfer motor carrier properties. Thus, on June 19, 1963, Great Coastal commenced operating the Price Transfer rights under temporary lease. This lease operation has continued from that date until the date of this writing, pursuant to an order of the Commission extending the authority for temporary lease until such time as the application has been finally determined.

Appellants submitted written and oral evidence in support of the application for approval of the franchise transfer at hearings held in June and July of 1963. On April 3, 1964, the report and order recommended by the Hearing Examiner (Appendix C hereto) was served. Exceptions to the recommended report and order were filed by the applicants below and by one protestant. Thereafter, on December 14, 1964, the Interstate Commerce Commission, Division 3, entered its Decision and Order affirming and adopting as its own the report and order recommended by the Hearing Examiner. There followed the complaint to the court below which complaint was dismissed by final order of the court on June 22, 1965.

In denying approval of the sale of the Price Transfer operating rights to Great Coastal, the Interstate Commerce Commission concluded that approval of the

application would result in the establishment of a new competitive service for which no public need had been demonstrated. For that reason, it was concluded that the proposal would not be consistent with the public interest. In reaching its conclusion respecting new service, the Commission applied a standard of law not heretofore enunciated by the Commission, one which is inconsistent with those previously invoked in cases of this kind. Moreover, the Commission did not state the grounds or reasons upon which its determination to apply a new and different standard rested.

The manner in which the new service issue is decided by the Commission frequently controls the disposition of cases involving the purchase or acquisition of control of carrier franchises. Behind application of the doctrine is the basic policy of the Commission that the transfer of dormant franchises or those which have not been used actively in the manner contemplated by the vendee, is contrary to the public interest since existing carriers may be met by a new competitive service—to their detriment.

The Commission has therefore required applicants seeking § 5(2) approval to establish through traffic studies the existence and nature of past carrier operations by the vendor. Form BMC-44 compiled by the Commission for use in submitting to it applications for § 5(2) approval requires applicants to append an exhibit indicating the nature and volume of shipments handled in the transferor's service during the six months preceding submission of the application (or during the six months preceding negotiation and execution of the purchase contract). If the transferor's operating rights are not shown to have been utilized sufficiently to overcome a finding of dormancy, the

Commission will generally disallow their transfer on the theory that a transfer of dormant rights would result in the institution of a new service without showing of public necessity therefor. On the other hand, where the transferor and transferee are shown to have provided a substantial service between their respective territories through connecting line arrangements with each other or with other carriers, the Commission has viewed the resulting service as already competitive and therefore already adjusted to by competing carriers, so that there is no basis for finding that a new service would result from approval, or that a joinder of rights would adversely affect existing carriers.

In the instant case, the Commission made a specific finding that the appellants had provided a competitive service through interline for a period of nearly eight months prior to the signing of the contract of sale, i.e., that a competitive service had already been established by plaintiffs nearly eight months before the purchase contract was negotiated.[1] Stated otherwise, the Commission made a finding which—by those standards consistently and traditionally applied by it—completely foreclosed any conclusion that a new competitive service would stem from approval of the proposal.

Moreover, the Commission compounded that error by finding specifically that the Price Transfer rights *were not dormant,* relying upon the participation by Price in the joint service arrangement to make such a finding; and yet concluded that a continuation of the admittedly active joint service under the auspices of Great Coastal alone would result in a new service. This

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[1] Hearing Examiner's Recommended Report (Appendix C), page 37a.

result is utterly incompatible with Commission decisions in cases of this kind.

For example, in another case where the applicants had interlined traffic and had thus become competitive with other carriers only for a period of seven months prior to commencing operations under temporary authority,[2] the Commission approved the application for purchase of motor carrier operating rights and concluded that a new service was not contemplated in view of the previous interline operations conducted by the parties which were admittedly competitive. *Mistletoe Exp. Service—Pur.—Central News Exp., Inc.*, 90 M.C.C. 797 (1962) [see particularly pages 802-803]. There are literally scores of cases wherein the Commission has required a showing of no more than six months service to resolve the dormancy-new service issue. For example, see *West Nebraska Exp., Inc.—Pur.—Forsstrom,* 87 M.C.C. 733, 736 (1961); *Shamrock Van Lines, Inc.—Purchase—Arledge,* 87 M.C.C. 326, 330 (1961); and *Ryder Tank Lines, Inc—Pur.—York Interstate Trucking,* 87 M.C.C. 267, 274 (1961).

Indeed, the BMC-44 forms supplied by the Commission upon which applications for approval of the transfer are made expressly request a showing of service during the previous six months, and nothing more is requested or required. The established policy of the Commission on this matter is well described in *Dallas & Mavis Forwarding Co., Inc.—Pur.—Billy Baker Co.,* 85 M.C.C. 521, 529 (1960):

> "* * * However, the usual test period for determining the scope and nature of the operations per-

[2] Such operations could not lawfully have begun until sometime *after* the § 5 application was filed.

formed by a carrier, and the period for which data must be submitted as specified in the application form, is the period 6 months prior to the filing of the application under section 5, which, in the instant case, was November 25, 1958. Therefore, we would not be justified in finding vendor's rights dormant at this time if its operations subsequent to May 1 show that a representative service has been performed. On the other hand, in cases such as here, where dormancy is an issue, the scope and nature of vendor's service is best reflected by an examination of its operations prior to negotiations between the parties for the sale of the operating rights concerned. As the date of such negotiations has not been established, consideration will be given to traffic transported by vendor during the 6-month period preceding the date of the purchase agreement, which was November 8, 1958."

Despite this long standing practice, the Commission imposed a standard upon these appellants which provided that an admittedly competitive interline arrangement, carried on for a period of eight months prior to the execution of the contract of sale, and, indeed, for a year and two months prior to commencement of operations under temporary authority, was not sufficient to meet applicants' burden of proof respecting dormancy and new service. This new standard is clearly contrary to precedent, and the Commission failed utterly to explain why it abandoned the traditional test applicable to this class of case.

The principle that an agency must give its reasons for doing the things it does is firmly imbedded in administrative law. An example of recent application of this principle appears in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 9 L ed 2d 207 (1962). There, so-called "hot cargo clauses," in labor

union contracts were invoked to force a hiatus in motor carrier service in a certain geographical area. The Commission had available as possible remedies a choice of issuing a new Certificate of Public Convenience and Necessity to a newly formed motor carrier or of issuing a cease and desist order against continued withholding of service by existing carriers. Without any discussion as to why issuance of a cease and desist order was inappropriate, it chose to issue the Certificate to the new carrier. At 371 U.S. 167, the Court in remanding the case to the Commission said:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See Jacob Siegel Co. v. Federal Trade Com. 327 US 608, 613, 614, 90 L ed 888, 893, 66 S ct 758. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion' * * *."

Similarly, in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 9 L ed 2d 177 (1962), the Commission had issued an order requiring a stockholder in a trucking company to divest himself of stock in another motor carrier held in violation of § 5(4) of the Interstate Commerce Act. No explanation was given by the Commission as to why it ordered divestiture. The Supreme Court held that the question as to whether divestiture was the appropriate remedy was not ripe for review inasmuch as the Commission had

not considered other possible remedies and enunciated the reasons it invoked the one it did. The Court spoke as follows at 371 U.S. 130:

> "* * * But prerequisite to such review is evidence that judgment was in fact made, that the parties were heard on the issue, *that the proper standards were applied.* We find no such evidence in this record." [emphasis added]

Compare *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); and *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

Here, of course, the Commission ignored the standard consistently and traditionally invoked in cases of this kind, and imposed another without any explanation whatsoever for the abandonment of one and the adoption of the other.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The outcome of this proceeding is of vital public importance inasmuch as it involves the question whether an administrative agency has the power, arbitrarily and without warning, to impose a new and different standard in assessing consistency with the public interest without explanation of any kind or indication as to its reasoning. If an agency such as the Interstate Commerce Commission is allowed to perform its administrative functions in this manner, future litigants will find themselves lacking meaningful guidelines as to the nature of the proof required of them, and without sufficient foreknowledge of the standards to be applied.

Carriers considering actions which require prior agency approval must have a reasonable opportunity to know the general guidelines to be followed, to assess

the merits of a proposal with those guidelines firmly in mind, to determine whether, under the circumstances, the time and expense in seeking administrative approval is justified, and, thereafter, to meet fairly the burden of proof imposed by the tests to be applied.

This is especially true in cases of the kind here presented. The process of merger among larger motor carriers has accelerated. Applications under § 5 of the Interstate Commerce Act with increasing frequency involve multi-million dollar purchase prices. For example, there is now pending before the Interstate Commerce Commission a § 5 application for approval of an agreement in which the purchase price exceeds $10,000,000., *Yellow Transit Freight Lines, Inc.—Purchase—Watson-Wilson Transportation System, Inc.*, Docket No: MC-F-9030. Cases of this kind involve months of careful, exacting preparation and are extremely costly to the parties involved. Applicants must assume great expense in manhours and money to prepare one of these cases for presentation to the Commission. Frequently these expenditures represent but a portion of the overall expense encountered. Where, as here, temporary lease of operations must be assumed by the buyer to prevent cessation of the seller's service to the public, additional capital must, in the usual case, be committed to assure the continuance of that service. If the proposal fails to be approved, that capital is seldom recovered.

Under such circumstances, it is disastrous to have the Commission arbitrarily change the rules of the game without warning or reason. The inevitable result is an unconscionable burden upon applicants in these proceedings. An applicant-vendee must have some reasonable stable basis for assessing the merits of a

proposal before committing himself and his capital to it. Those subjected to the administrative process are entitled to know what standards will be applied, or have fair warning of contemplated changes—with an explanation of the reasons therefor.

In addition to the arbitrary manner in which the Commission changed its standards applicable to this class of case, the Commission's decision defies rational explanation in light of past cases. As earlier stated, the Commission has traditionally regarded an interline service in existence for as much as eight months prior to the execution of the contract of sale to be already competitive. *Mistletoe Exp. Service—Pur.—Central News Exp., Inc., supra.* To be new, the service must have been brought about by the contemplated transfer of motor carrier properties. It is not a new service if it has existed for many months, and was not instituted merely in anticipation of the sale transaction. Therefore, any decision that an admittedly competitive service—one which grew out of a pre-existing interline arrangement entered upon long before the parties even contemplated transfer of the operation rights involved—is a new service born of the sales transaction simply cannot be rationally explained.

The Commission cannot lawfully impose one standard on these applicants and another on others. To allow it to do so is to encourage discrimination and chaos in the administrative process. Unchecked, this method of decision-making can only do injury to the administrative process and defeat the purposes for which administrative agencies are established.

CONCLUSION

The questions presented by this appeal are substantial and of sufficient public importance to require plenary consideration with briefs and oral argument.

Respectfully submitted,

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Dated: October 18, 1965

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
At Richmond

Civil Action No. 4205

GREAT COASTAL EXPRESS, INCORPORATED, and PRICE TRANSFER COMPANY, INC., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants.*

(Argued June 11, 1965 Decided)

Before Bryan, Circuit Judge, and Lewis and Butzner, District Judges.

John C. Goddin of Richmond, Virginia and John C. Bradley and Robert G. Knechtel (Rice, Carpenter and Carraway) of Washington, D. C., attorneys for the plaintiffs.

William H. Orrick, Jr., Assistant Attorney General and John H. D. Wigger, Attorney, Department of Justice, both of Washington, D. C. and C. Vernon Spratley, Jr., United States Attorney and Tommy P. Baer, Assistant United States Attorney, both of Richmond, Virginia, attorneys for defendant United States of America.

Robert W. Ginnane, General Counsel and Clarence William Vandegrift, attorney, Washington, D. C., attorneys for defendant Interstate Commerce Commission.

Russell Alton Wright of Richmond, Virginia and J. G. Dail, Jr. (Turney, Major, Markham & Sherfy) of Washington, D. C., attorneys for intervenor-defendant, The Adley Corporation.

James W. Lawson, (Macdonald & McInerny) of Washington, D. C. and Russell Alton Wright (Williams, Mullen & Christian) of Richmond, Virginia, attorneys for intervenor-defendant, Turner's Express, Inc.

PER CURIAM:

Authorization for the Great Coastal Express, Inc. to purchase the certificate of convenience and necessity of Price Transfer Company, Inc. was denied by the Interstate Comerce Commission.* §§ 5(2)(a)(i), 5(2)(b), 5(2)(c), 5(4) and (5), 5(13), Interstate Commerce Act, part 1, 49 U.S.C. 5(2)(a)(i), 5(2)(b), 5(2)(c), 5(4) and (5), and 5(13). The two motor carriers sue to vacate the order and obtain other appropriate relief. 28 U.S.C. 2321-2325. The suit cannot succeed because the court is not persuaded that the Commission's findings and conclusions are either erroneous in fact or in law.

Each corporation is duly certificated as an interstate common carrier of freight by motor vehicle over irregular routes. Coastal's operations are permitted between New York City and vicinity on the north, and, on the south, points in several counties of Virginia, including James City County which is the most southeastern of its permissible Virginia territory. Thus it cannot enter the adjoining City of Newport News or the precincts of Norfolk. Price's operations embrace the Hampton Roads area, including Newport News and Norfolk but do not run into James City County or other territory of Coastal. However, by reason of a tolerance of five miles allowed by the Commission beyond a city's boundaries, the two

* No. MC-F 8338 Great Coastal Express, Incorporated—Purchase—Price Transfer Company, Inc., December 14, 1964.

carriers may meet in James City County within this margin of Newport News.

Disapproval of the acquisition was not put upon the buyer's unfitness, financial or otherwise. Nor was it placed upon the breaches by the contracting parties of the laws and regulations which were found by the Commission in their establishment, in April 1962, of a connecting line arrangement between them. This arrangement became legitimate only on November 13, 1963 upon the temporary grant by the Commission of authority to Coastal, under § 210a(b) of the Act, 49 U.S.C. 310a(b), to lease Price's operating rights pending disposition of the present controversy. Decision went exclusively upon the finding of the Commission's examiner, which it adopted, that to allow the application would establish a new and different service, that no need for this extra facility was shown and that its creation would not be "consistent with the public interest". The quoted phrase expresses the criterion by which § 5(2) of the Act requires the Commission to appraise such a transaction. Altogether factual, this holding is clearly stated and is not to be up-ended by the court unless either manifestly without foundation in the evidence or unsound in law. Gilbertville Trucking Co. v. United States, 371 U.S. 115, 126 (1963); McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944). In neither aspect do we find it vulnerable.

The predominant contention of the plaintiff carriers is, in effect, that since Price's operations were not dormant previous to the purchase agreement, as the examiner has demonstrated, the combining of their operating rights would mean only the substitution of one service for two, the sole difference being the elimination of the interchange. That there are other consequences was established here by the protesting intervenors. The examiner so found, and in part spoke to these results as follows:

> "The record does not show any participation by Price, previous to establishment of the connecting-

line arrangement with Great Coastal, in traffic moving between the Norfolk area and Great Coastal's authorized points of service. Likewise, the record does not show that Great Coastal participated to any substantial extent, previous to establishment of the connecting-line arrangement with Price, in traffic moving between Great Coastal's authorized points of service and the Norfolk area. Stated differently, neither Price nor Great Coastal had been a competitive factor in traffic moving between their respective territories. Thus, the Great Coastal-Price interline movement of traffic which began in April 1962, as described herein, was a new competitive service which had not theretofore been faced by existing common carriers providing either single-line or connecting-line service to the Norfolk area from the points which Great Coastal is also authorized to serve."

Nothing irrational or unreasonable, to repeat, appears in this conclusion.

The complaint and action must be dismissed.

Dismissed.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
At Richmond

Civil Actiton No. 4205

GREAT COASTAL EXPRESS, INCORPORATED, and PRICE TRANSFER COMPANY, *Plaintiffs*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

Final Order

Upon consideration of the pleadings in this action and the arguments of counsel, orally and on brief, as well as of the record of the proceedings before the Interstate Commerce Commission, particularly the findings, conclusions, opinion and order of the Commission therein, the court is of the opinion, for the reasons set forth in its opinion this day filed, that the complaint herein and this action should be dismissed, it is now so ORDERED.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ JOHN D. BUTZNER, JR.
United States District Judge

June 22, 1965

• • • • • • • • • • •

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-F-8338

GREAT COASTAL EXPRESS, INCORPORATED—
PURCHASE—PRICE TRANSFER COMPANY, INC.

Decided.....

Application of Great Coastal Express, Incorporated, for authority to purchase the operating rights of Price Transfer Company, Inc., and of C. E. Estes to acquire control of the operating rights through the transaction, denied.

John C. Bradley and *John C. Godden*, for applicants.

J. G. Dail, Jr., *James W. Lawson*, and *Spencer T. Money*, for protestants.

Report and Order Recommended by Louis W. Sornson, Hearing Examiner

By joint application filed January 18, 1963, Great Coastal Express, Incorporated, (Great Coastal) of Richmond, Va., and Price Transfer Company, Inc., (Price) of Norfolk, Va., seek authority under section 5 of the Interstate State Act [sic] for the purchase by the former of the operating rights of the latter for $3,000. C. E. Estes, sole stockholder of Great Coastal, joins in the application and requests authority under the same section to acquire control of the operating rights through the transaction. Applicants operate more than 20 motor vehicles subject to part II of the act.

By an order entered June 13, 1963, under section 210a (b) of the act, as extended by order of November 13, 1963, pending final disposition of the section 5 application, Great Coastal was authorized to lease the operating

rights sought to be acquired herein at a total rental of $25 per month.[1] Operations by Great Coastal under the temporary approval commenced on June 19, 1963.

The application was referred to the examiner for hearing and the recommendation of an appropriate order. Nine motor carriers presented evidence in opposition to the application.[2] Briefs were filed on behalf of the applicants and the first two motor carrier protestants named in the footnote.

The Parties

Great Coastal, the proposed vendee herein, is a New Jersey corporation, organized in 1957. Since 1958 C. E. Estes, of Richmond, Va., has owned all of its issued and outstanding stock.[3] Great Coastal is the holder of the motor common carrier operating rights set forth in Certificate No. MC-4491, issued by the Commission September 11, 1958.[4] So far as is here pertinent, Great Coastal is au-

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[1] Granted by Division 3, acting as an Appellate Division, upon reconsideration of the order of Finance Board No. 1, entered April 8, 1963, denying the application for temporary approval under section 210a(b).

[2] Appearances were made for The Adley Corporation, doing business as Adley Express Company (Adley); Turner's Express, Inc. (Turner's); and Associated Carriers of Virginia, a motor carrier association, and interested members, namely, Blue & Gray Transportation Co., Inc. (Blue & Gray), Davidson Transfer & Storage Co. (Davidson), Estes Express Lines (Estes Express), Old Dominion Freight Line (Old Dominion), and Preston Trucking Company, Inc. (Preston). East Coast Freight Lines (East Coast) and Hemingway Transport (Hemingway) also presented evidence.

[3] C. E. Estes is also the sole stockholder and sole proprietor, respectively, of C. E. Estes, Incorporated, a Virginia corporation, and of Charles E. Estes, trading as C. E. Estes. Each of these companies engages in intrastate contract operations by motor vehicle in Virginia.

[4] Superseding previous certificates, dating back to "grandfather" certificate in No. MC-4491 issued September 28, 1942, to Great Coastal Express, Incorporated, then a Virginia corporation.

thorized to transport general commodities, with exceptions, over irregular routes, between Quantico, Va., and points in 28 named Virginia counties, including James City County,[5] on the one hand, and, on the other, points in New Jersey within 20 miles of Newark, N. J., points in the New York, N. Y. Commercial Zone, points in Fairfield County, Conn., and points in New York, New Jersey, Pennsylvania, Delaware, and Maryland, north of Baltimore, Md., on specified highways between Baltimore, Md., and New York, N. Y. Its principal office is in Richmond, Va., and it has a terminal in Richmond and in Jersey City, N. J. Prior to 1963 it leased its revenue equipment from an affiliated corporation also wholly-owned by C. E. Estes. As of December 31, 1963, however, the latter corporation was merged into Great Coastal. On May 31, 1963, Great Coastal owned and operated 17 trucks, 29 tractors, and 62 trailers.

Great Coastal's balance sheet as of April 30, 1963, shows assets aggregating $524,833, including current assets $110,212, composed of cash and working fund $12,158, accounts receivable $72,728, and prepayments $25,326; carrier operating property less reserve for depreciation $399,002; intangible property less reserve for amortization $194; and deferred and miscellaneous debits $15,425. Liabilities and net worth consisted of current liabilities $98,392, equipment obligations due within one year $92,400, equipment obligations due after one year $129,900, reserves $2,549, capital stock (75 shares) $154,069, and earned surplus $47,523. Great Coastal's income statements for 1961, 1962, and the first four months of 1963 show oper-

[5] Of the 28 counties in central and southeastern Virginia authorized to be served by Great Coastal, James City County is the farthest southeast. Beyond James City County to the southeast lay the cities of Newport News, Hampton, Norfolk and Portsmouth. Stated differently, Great Coastal's authority in Virginia extends southeast to and including James City County but it does not extend beyond to Newport News, Hampton, Norfolk and Portsmouth.

ating revenues of $1,072,862, $1,213,833, and $392,246, respectively, and a deficit and net income, before provision for income taxes, of ($19,057), $29,260, and $38,702, respectively. Estes testified that Great Coastal enjoys a line of credit with the First and Merchants Bank at Richmond of $500,000, against which only approximately $200,000 has been drawn.

Price, whose operating rights are sought to be acquired, is a Virginia corporation, organized in 1928. As a result of a grandfather application, it was granted a certificate on April 30, 1941, in No. MC-41653, authorizing it to operate in interstate or foreign commerce as a motor common carrier of general commodities, with exceptions, over irregular routes, between Norfolk, Portsmouth, South Norfolk, Virginia Beach, Newport News, Phoebus, Hampton, and Langley Field, Langley, Va. In the past, prior to acquisition of its capital stock by its present owners, it appears that substantially all of Price's revenues were derived from local cartage and delivery operations in the Norfolk area, including occasional service to the nearby points named. Predominant in this regard at the time of such acquisition were contracts with one or more meat packing companies whereunder Price would receive and unload freight cars of meat transported to Norfolk by rail and would make deliveries of the meat shipments in specially-equipped trucks to the various consignees in the Norfolk area. In February of 1961, Eric T. Nielsen, and his aunt, Mary Lloyd Barrett, purchased 96 of the 100 issued and outstanding shares of Price's capital stock.[6]

[6] Nielsen purchased 46 shares and his aunt 50 shares. For the stock they paid the sum of $1,000, payable at the rate of $50 per month, and assumed liabilities in the amount of $9,000. The certificate held by Price appeared on the books of the corporation as having a value of $1,000. Accordingly, for all the assets of Price, Nielsen-Barrett may be said to have agreed to pay a total of $10,000. Also acquired at the same time was stock control of Lynnhaven Motor Lines, Inc., a corporation which leased vehicles to Price for use in the latter's carrier operations. At the time of the hearing, all of Lynnhaven's assets had been repossessed or attached.

Nielsen assumed active management of Price and sought to expand its operations.[7] Although gross revenues were increased sizeable net operating losses resulted.[8] Near bankruptcy ensued. At the time of the hearing, Price had not operated in its own equipment since December 1962 as a result of repossessions and inability to purchase licenses, it had no employees since December 1962, it had had no terminal since eviction from its last terminal in November 1962, its business had been conducted solely by Nielsen, mostly from his home for several months, its liabilities exceeded its assets several times over, it had no cash or credit, and a large number of its debts had been reduced to judgments. In an affidavit submitted by Nielsen dated April 23, 1963, in support of the petition for reconsideration of the denial of the temporary authority application by Finance Board No. 1, it was stated that Price could not continue its operations beyond a few more days or weeks. Through forbearance of its creditors Price was able to continue until June 19, 1963, on which date Great Coastal commenced its operations under the temporary lease of Price's operating rights authorized by the Commission upon reconsideration.

The Agreement

A month or two after Nielsen-Barrett acquired Price in February 1961, negotiations were begun for sale of 60 per cent of its voting stock to Davidson, a protestant in

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[7] Among other things, Nielsen caused Price to become a member of the Middle Atlantic Conference tariff and wrote letters to other carriers soliciting interline business.

[8] For the years 1958, 1959 and 1960, Price had operating revenues of $36,000 to $39,000, with a total net loss for the three years of about $3,600. For 1961 Price had gross revenues of $77,807, with a net loss of $10,500. For the first six months of 1962, revenue was $49,728, with a net loss of $19,354. No figures were submitted for the last half of 1962 for the stated reason that Price was unable to pay an accountant to compile the information.

this proceeding. In October 1962 these negotiations were terminated for various reasons, including Price's worsened financial condition and the refusal of Mrs. Barrett to sell all of her interest in the company at the price offered. Nielsen then took the initiative to dispose of Price's operating rights to someone else. Because of existing arrangements with Great Coastal, next described, Nielsen approached Great Coastal. The negotiations culminated in an agreement, evidenced by a document signed November 29, 1962, for the purchase by Great Coastal of Price's operating rights for a consideration of $3,000. A cash payment of $1,500 was made, and the balance of $1,500 is due and payable within ten days following Commission approval of the transfer of the operating rights. In the event of Commission denial, the agreement provides for refund to Great Coastal of any part of the consideration paid to Price.

Description of Arrangements Between Great Coastal and Price

At the time of negotiations between Price and Great Coastal for the purchase by the latter of the former's operating rights, the two carriers were engaged in a connecting line operation, particular in both physical and traffic aspects. According to the record, in November 1961 Nielsen on behalf of Price wrote to C. E. Estes, owner of Great Coastal, soliciting freight from Great Coastal destined into the Norfolk area. Nielsen suggested that the respective territories of the two carriers overlap at the southeast end of James City County by reason of the fact that the commercial zone of Newport News extends five airline miles northwestward into James City County [9] and that freight traffic could be interchanged at any selected point in James City County within five airline

[9] Application of the population-mileage formula as prescribed in *Ex Parte* MC-37, Commercial Zones and Terminals Areas, 46 M.C.C. 665.

miles of Newport News. Great Coastal at first did not respond to Nielsen. However, at a later time Great Coastal did become interested, and steps were then taken to complete the interchange arrangement and to file the required tariff concurrences. This was done by April of 1962.

Great Coastal's principal traffic has been between New York City and intermediate points, on the north, and Richmond, Va., on the south, and although Great Coastal handled some shipments destined to the Norfolk area, by means of interline connections with other motor carriers at Richmond,[10] it does not appear that Great Coastal participated to any substantial extent in Norfolk traffic prior to establishment of the Price interchange.[11] It was no doubt for this reason, that is, lack of a sufficient volume of shipments, that Great Coastal initially displayed no interest in establishing an interchange arrangement with Price. Under the proposed arrangement, Great Coastal would haul trailers containing the Norfolk-destined shipments to a selected point within five miles of Newport News, would turn over the trailers to Price at that point for completion of the haul into Norfolk, and would later recover the trailers at the selected point. Obviously a considerable volume of traffic would be required to support such an operation. It was not until later that a source of such traffic developed, namely, shipments to be transported for Norfolk area members of the Central Virginia Shippers Association.

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[10] Great Coastal's president testified that in the past it had interchanged Norfolk traffic at Richmond with Estes Express, Blue & Gray, and Old Dominion.

[11] No evidence was submitted by Great Coastal as to the extent it had participated in Norfolk traffic prior to the Price interchange. The record supports a conclusion that such participation was not substantial.

The Central Virginia Shippers Association (C.V.S.A.) has about 350 members, including department stores and other retail establishments. There are a number of such members in the Norfolk area.[12] Members of the C.V.S.A. ordering merchandise from manufacturers and other vendors in the New York metropolitan area request that such merchandise be delivered to a particular address in New York City. At this address the packages of merchandise are received by a freight consolidator in the service of C.V.S.A., herein referred to as "Paco." Paco consolidates the packages destined to the C.V.S.A. members in the Norfolk area into trailerloads. Normally, there will be hundreds of separate shipments in a single trailer-load. The line-haul carrier selected by the C.V.S.A. then transports the freight, usually during the night, at the advantageous "freight all kinds" volume tariff rate, to the facility of a local cartage agent in Norfolk. Generally, the route traversed between New York City and Norfolk is via Philadelphia, Baltimore, and Richmond, by-passing those cities unless freight is to be on or off-loaded at one or more of such intermediate points.[13] Local delivery to the consignees in the Norfolk area is then effected by a cartage agent, also selected by the C.V.S.A.[14]

Over the past several years the C.V.S.A., in its discretion, has used the services of several different motor carriers to perform the line-haul transportation and local delivery of the consolidated shipments destined to the Nor-

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[12] As well as in the Richmond area. Arrangements identical to those next described have been made for C.V.S.A. members in the Richmond area.

[13] Merchandise ordered by C.V.S.A. members from Philadelphia is similarly consolidated, by P. Mashbitz & Sons, for volume-rate transportation to Norfolk or Richmond. Hereinafter, reference to C.V.S.A.-consolidated shipments includes both New York City and Philadelphia shipments, unless otherwise indicated.

[14] In Norfolk the local cartage agent is Merchants Delivery. In Richmond it is Old Dominion.

folk area members. For several months prior to March 16, 1962, the C.V.S.A. New York-to-Norfolk shipments were handled as follows: The line-haul of the trailers from New York to Richmond was performed by Hemingway;[15] the line-haul of the trailers from Richmond to Norfolk was performed by Old Dominion; and at Norfolk delivery of the shipments was performed by the cartage agent, Merchants Delivery. Some time prior to March 16, 1962, C.V.S.A. decided to select Great Coastal as the principal line-haul carrier of the consolidated shipments destined to Norfolk (as well as the consolidated shipments to Richmond). Under its own authority Great Coastal could perform the New York to Richmond transportation, but its authority did not extend from Richmond to Norfolk. It was therefore necessary for Great Coastal to enter into a connecting line arrangement with another motor carrier. It was at this time that Great Coastal took steps to complete[16] a lease and interchange agreement with Price.[17]

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[15] Hemingway also performed the New York to Richmond long-haul of the trailers containing the consolidated shipments for C.V.S.A. members in the Richmond area.

[16] A period of time was required to complete the arrangements and for the tariff concurrences to become effective. In the meantime, an arrangement was made with Estes Express to perform the Richmond to Norfolk transportation, involving a 30-day lease by Estes Express of Great Coastal's equipment and drivers.

[17] The parties were aware that motor carriers conducting interchange operations are charged with compliance with the Commission's regulations governing the lease and interchange of vehicles (49 CFR 207) and related requirements, including the following: that the interchange take place at a point authorized to be served by each carrier, a written lease, the exchange of receipts, the safety inspection of the equipment by a qualified agent of the lessee before possession is taken, that the lessee take complete control and responsibility for the equipment and lading, proper shipping documents, identification of the equipment as that of the operating carrier, drivers' logs and medical certificates, availability and retention of certain documents and records, etc.

The operation started in April 1962. For a period of time, Price's tractors were used to pull the Great Coastal trailers into Norfolk from the interchange point. When Price's equipment began to be repossessed, however, Great Coastal's tractors and drivers were used to complete the haul to destination.[18] The site[19] selected for the interchange and for the safety inspection of the equipment, the placing of Price's identification devices on both sides of the equiment, and the paper work, was a service station, referred to as Damion's Service Station,[20] located near the intersection of Virginia Highway 168 and Virginia Secondary Highway 641.[21] Nielsen estimated Damion's Service Station as being 4½ miles from the Newport News city limits, and both Nielsen and Estes testified that the propriety of the site was discussed with a District employee of the Commission at Richmond and affirmed after reference to a map. However, reference to map Exhibit H-22 shows that Damion's Service Station is slightly over 5¾ miles from the nearest point of the Newport News

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[18] Price's share of the revenues, based on proportion of mileage over its authority, was reduced by 90 per cent for the use of Great Coastal's equipment and drivers. The C.V.S.A. traffic was prepaid and all revenues were collected by Great Coastal.

[19] Testimony concerning the interchange operation was given by Nielsen, manager of Price, and by Estes, owner of Great Coastal. Applicants show Bingley Center to be the point of interchange on all their interline shipments. Nielsen testified that the site of the interchange was Damion's Service Station, in Bingley Center, and mentioned no other point. Estes later testified that for the beginning period when Price's tractors were used, the interchange point was a "truck pull-off" along Virginia Highway 168 in James City County approximately one-half mile from the Newport News city limits. He considered both interchange sites to be embraced by the name "Bingley Center."

[20] Damion (or Daimon) appears to be the proprietor's name.

[21] The location is marked on Exhibit H-22, a map of James City and York Counties prepared by the Virginia Department of Highways.

city limits. Accordingly, Price had no authority to serve that point or to engage in interchange there.

The particular site was selected as the interchange point, among other reasons, in order that Price might appoint Damion's Service Station personnel as its agents for the safety inspection, execution of documents, etc., at such time as Nielsen would not be present.[22] The Norfolk-bound trucks would reach the interchange point very early in the morning and in order for Nielsen to be present for the few minutes involved it was necessary that he leave his home at 2:00 or 3:00 a.m. and drive approximately 40 miles. It was arranged that the Price shipping documents for the interlined shipments would be prepared for Price in most instances by personnel of Great Coastal in Richmond. In short, it is clear that, as Price's condition deteriorated, the operation was set up for movement of the traffic by Great Coastal with minimum participation by Price. From the record it appears, however, that on or about mid-April of 1963 District employees of the Commission conferred with the parties regarding the interchange and suggested changes in procedures to meet more fully the requirements of the Commission's leasing regulations.[23] At the hearing Nielsen testified that for some time he had been driving from his home in Norfolk to Damion's Service Station every morning in order to inspect the vehicles, prepare the lease and inspection papers and Price's freight bills himself, dispatch the drivers

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[22] A fee of two dollars for each vehicle was paid to Damion's Service Station for the use of the premises and services. The qualifications of the Damion's Service Station personnel to serve as agents of Price, including knowledge of applicable regulations, were not established on the record.

[23] As a matter not directly related to the leasing regulations but developed at the hearing, it appears that for failure to pay dues to the Middle Atlantic Conference for a period of time, Price was eliminated from its published tariffs and consequently had no rates on file with the Commission January 1 to February 25, 1963.

to Norfolk, and otherwise assume control of the equipment and lading on behalf of Price.[24]

As indicated, the interchange operation established by Great Coastal and Price was devoted primarily to the trailer-load traffic of the C.V.S.A. inbound to Norfolk.[25] For the first few months of the interchange operation it appears that the carriers did handle a comparatively large number of individual shipments for shippers other than the C.V.S.A., in conjunction with the C.V.S.A. traffic.[26] However, from late August 1962 through January 1963, no traffic other than the C.V.S.A. shipments was handled through the interchange. And from February through May 1963 only a very few shipments for other shippers were moved through the interchange (only 1 in February, 5 in March, 2 in April, and 5 in May). In sum, the record in this proceeding does not show that Great Coastal has participated substantially in traffic moving from its territory to the Norfolk area, other than for the C.V.S.A. traffic described.

The volume of the traffic transported through the Great Coastal-Price interchange has not been large (relative either to Great Coastal's total traffic, or to the Norfolk traffic subject to diversion by Great Coastal from other carriers should it acquire an extension of its operating rights into Norfolk). In the period January through May 1963 the abstract of shipments moving in the joint-line

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[24] Nielsen was employed by Great Coastal as a salesman in the Norfolk area for a period of a few weeks in the spring of 1963, salary $100 per week, but ceased when he found he could not perform this work and his duties in connection with the interchange operation as well.

[25] There were no northbound shipments except for returned merchandise.

[26] An abstract of shipments moving in the Great Coastal-Price interline service for the period June 1, 1962, through May 31, 1963, was submitted by Great Coastal, Exhibit H-20. Price's abstract of shipments, discussed below, is Exhibit H-11.

service submitted by Great Coastal (Exhibit H-20) shows the volume to be from 20 to 27 trailer-loads per month, or about one per each week day. Weights vary from 7,000 lbs. to 24,000 lbs., with the average weight appearing to be about 16,000 or to 17,000 lbs. For the months January through May 1963 Great Coastal showed its revenues from the joint-line service to be $3,347, $6,620, $6,363, $4,899, and $4,937, respectively. This compares to Great Coastal's total operating revenues for 1962 of $1,213,833.

Vendor's Operations

To demonstrate the nature and extent of its operations in interstate commerce in the months preceding the hearing, Price submitted an abstract of shipments transported by it in the period September 5, 1961 to May 31, 1963 (Exhibit H-11). According to an analysis submitted on brief,[27] there are a total of 1,353 shipments listed, broken down by connecting carrier[28] as follows:

Great Coastal	704
Morton Transfer	186
Springmeier Shipping Co.	215
Norfolk & Western Railway	20
Turner's Express	185
Mercury Motor Express	23
Other[29]	20
	1,353

The Great Coastal-Price shipments have been discussed.

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[27] Submitted by protestant Adley. The accuracy of the analysis is acceptable for purposes used.

[28] Inasmuch as Price's territory is entirely within Virginia, only shipments transported by another carrier to or from other states qualify as being in interstate commerce. Of the 1,353 shipments listed, 1,306 are inbound. Of the 47 outbound shipments, 23 consisted of hauling trailers for Mercury Motor Express at a flat charge (see discussion *infra*). The remaining were rejected merchandise returned via Great Coastal.

[29] Estes Express, 14; and Blue & Gray, 6.

Morton Transfer.[30] The Price-Morton arrangements were very similar to the Price-Great Coastal arrangements described above. That is, Morton received at Richmond trailer loads of freight (candy) which had moved in piggy-back rail service from Chicago and were destined to a cartage agent in Norfolk for unloading and distribution to consignees; Morton's authority extended to Newport News but not to Norfolk (see footnote 30), so it was necessary that the Newport News-to-Norfolk portion of the transportation be completed under the operating rights of a second motor carrier; an arrangement was entered into with Price for this purpose. Commencing on or before December 1962,[31] by which time Price no longer had any equipment or drivers, Morton's tractors and drivers were used to complete the haul into Norfolk. Again, the arrangement was such as to permit minimum participation by Price.[32] At the hearing, however, Nielsen testified that for some time, in connection with driving to Damion's Service Station to meet the Great Coastal vehicles, he had also been meeting the Morton vehicles at Damion's Service Station and had been proceeding with the driver to some point along the road in Newport News,

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[30] Morton Schneider, doing business as Morton Transfer, Richmond, Va. As here pertinent, Morton Transfer holds authority, under certificates issued in No. MC-35541 and No. MC-35541 (Sub-No. 12) to transport meat and candy, in vehicles equipped with mechanical refrigeration, from Richmond, Va., to points in Virginia within 65 miles of Richmond.

[31] Only a very few of the 186 shipments were handled prior to this time. In addition to the volume shipments of candy, a number of individual shipments of meat are listed on the abstract.

[32] It does not appear that any agents were appointed by Price to perform the safety inspections, etc., at such times as Nielsen could not be present. In short, it appears that the Price participation in the Price-Morton arrangement may have been even more minimum than in the Price-Great Coastal arrangement.

where he inspected the vehicles, did the paper work,[33] and assumed control on behalf of Price. The vehicles were released to Morton in Norfolk.

Springmeier Shipping Co. Exhibit H-11 lists 215 shipments, during August and September 1962, which shows the connecting line to be Springmeier. It was developed, however, that Springmeier is not a direct carrier but is a freight forwarder. Accordingly, as stated by applicant's counsel, these are not interline shipments. It appears that Springmeier shipped loaded trailers by piggy-back rail service to Norfolk, consigned to its agent. The agent then moved the trailers from the rail terminal in Norfolk to Price's terminal in South Norfolk (except on occasions Price would make the pickup). Price would then unload the trailers and deliver the individual shipments to consignees in the Norfolk area. Nearly all the deliveries were made in Norfolk, but a few were made to the nearby points.

Norfolk & Western Railway. Exhibit H-11 lists 20 shipments, transported by Price between September 1961 and March 1962, which shows the connecting line to be the Norfolk & Western Railway. Here again, these were not interline shipments. The shipments listed are freight cars of meat transported by rail to Norfolk. Price's function, under contract with the meat packer-shipper, was to unload the freight cars and make deliveries of the individual shipments of meat to consignees in the Norfolk area. Nielsen testified that most deliveries were made in Norfolk but that a few deliveries were made to nearby points.

Turner's Express. Of the 185 shipments listed, 180 were transported between September 30 and October 3, 1961. Between September 30 and October 3, 1961, Turner's teamster employees in Norfolk were on strike. During this period of time, Price was given interstate shipments

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[33] Except that it was admitted that Morton continued to prepare Price's freight bills for the shipments.

to deliver, mostly in Norfolk but a few nearby points, with payment being made to Price on a per-hundredweight basis. On a few occasions, prior to March 1962, Turner's did use Price as a connecting carrier to make deliveries of freight within Price's territory but beyond Turner's authority.

Mercury Motor Express. The 23 shipments were trailer-loads of freight moved from the Naval Supply Center in Norfolk to South Norfolk and thence to destinations in Florida, under section 22 quotations to the U. S. Government.[34]. The participation of Price was to haul the trailers, furnished by Mercury, from the Naval Supply Center in Norfolk to a terminal in South Norfolk for a flat charge of $20 per trailer. According to the abstract, 12 of the shipments were of household goods, a commodity which Price is not authorized to handle.

Consignee Support

Two Norfolk members of the C.V.S.A.[35] submitted testimony in support of the application. Each retail organization receives a number of shipments daily from the New York City area. The witnesses testified that the C.V.S.A. traffic, consolidated by Paca in New York City, was being consistently delivered to them by the Norfolk cartage agent the next morning, after overnight transportation by the Great Coastal-Price combination.[36] Such reliable overnight service facilitates the coordination of advertising and sales programs and is otherwise desirable. Other

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[34] In the period November 1961 to November 1962.

[35] Slydder Department Store and Hofheimer's, Inc. In addition, an officer of the C.V.S.A. gave factual testimony concerning the handling of the C.V.S.A. traffic.

[36] The Paca arrangement was made in 1955 and both witnesses said that in general overnight service had been received since 1955. One witness testified that overnight service had been more consistent since selection of Great Coastal.

shipments of merchandise, individually shipped via Railway Express or received via the less-than-truckload services of other motor carriers, ordinarily would take as much as three days for delivery.

An employee of Montgomery Ward & Co. testified that although his company operates equipment of its own, it needs the services of common carriers to accomplish about three deliveries a day to the stores in the Norfolk area. With respect to merchandise ordered (through a distribution center) from various manufacturers or suppliers in the New York City area, the stores would like to have overnight service, which was not being received.[37] The shipments range from 5 to 1,000 lbs. and are handled on a less-than-truckload basis.

The three consignees were questioned by protestants' counsel concerning the adequacy of common carrier service being received from protestants on less-than-truckload traffic from points involved in this proceeding. Their replies were variously that they had not received or could not remember any complaints, that they were receiving "good service," and that such service is "reasonably adequate."

PROTESTANTS

Carriers providing New York-to-Norfolk single-line service. These are Adley, Turner's, Preston, and Davidson.

Adley is a regular-route, general-commodity carrier which operates along the eastern seaboard from Canada to Virginia. As more specifically related to this proceeding, it possesses regular-route authority between the Norfolk area, on the one hand, and, on the other, Baltimore, Philadelphia, Northern New Jersey, New York City, and Fairfield County, Conn. At the time of the hearing, Adley

[37] The witness was unable to give any specific transit-time information of shipments transported by the motor carriers providing direct, single-line New York to Norfolk service.

operated approximately 1,300 units of equipment and maintained 25 terminals, including terminals at Norfolk and New York City. Adley's 1962 revenues were $21,580,000.[38] Based on statistical studies (Exhibits H-27, H-31), Adley estimated that traffic handled by it between the Norfolk area and competitive Great Coastal points [39] amounting to nearly $800,000 in revenues on an annual basis would be subject to diversion by Great Coastal should its application be granted. A study of transit time performed by Adley on representative less-than-truckload shipments between Norfolk and New York (Exhibit H-27) shows second-day or better delivery service on nearly all the shipments.

Turner's entire operations are conducted between Norfolk and a 20-mile radius, on the one hand, and, on the other, Washington, Baltimore, Philadelphia, New York City, and a radius of each of the northern points. Its terminals are located in Norfolk, Baltimore, Philadelphia, and Jersey City. At the time of the hearing it operated approximately 190 units of equipment. Turner's 1962 revenues were $1,371,000. Its witness estimated that 90 per cent of its gross revenues are involved in this proceeding. Turner's holds out overnight service between all terminals on truck-load and less-than-truckload traffic.

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[38] Revenues of protestants, taken from annual reports filed with the Commission (stipulated for use) or from the record are reflected in a table presented in applicant's brief. Figures are rounded to nearest thousand.

[39] The right of Great Coastal to serve Baltimore under the terms of its certificate and in the light of the Commission's intention in the "grandfather" grant (see footnote 4) was raised as a controversial matter in this proceeding, in connection with the question of whether protestants in their traffic studies relating to diversion should include Baltimore as a competitive point. Great Coastal is providing service to Baltimore, in reliance on an informal opinion of the Director of the Commission's Bureau of Motor Carriers (copy contained in Docket No. MC-4491).

As here pertinent, Preston has regular-route, general-commodity authority between Norfolk and Suffolk, on the south, and New York City and Jersey City, on the north, via such intermediate points as Richmond, Washington, Baltimore, Salisbury, Dover and Philadelphia. It has 17 terminals, including terminals at all the points named. At the time of the hearing it was operating approximately 559 units of equipment. Its operating revenues for 1962 were $8,428,000. Preston submitted statistical studies showing that its inbound shipments to Norfolk from Baltimore, Wilmington, Philadelphia and Jersey City area terminals for one week in May 1963 amounted to roughly $7,455 in revenues and its outbound traffic from Norfolk to the same terminal amounted to roughly $9,255 in revenues (Exhibits H-6 and H-62). Multiplied by 52 the total revenues subject to diversion would exceed $868,000 on an annual basis.

Davidson likewise is a regular-route, general-commodity carrier which operates between Norfolk, Richmond, Washington, D. C., Baltimore, Philadelphia, Newark, and New York City. Among other places, it has terminals at all the cities named except New York City, where it is served by a receiving station. It operates approximately 693 units of equipment, and its revenues for 1962 were $9,470,000. Davidson did not submit any traffic studies with respect to revenues subject to diversion.

Carriers providing service between Norfolk and Richmond. These are Old Domininon, Blue & Gray and Estes Express.

As here pertinent, Old Dominion has regular-route, general-commodity authority between Norfolk and Richmond. It also operates extensively south and west of Norfolk in North Carolina, South Carolina, and Virginia. It has terminals at Richmond, Newport News and Norfolk, among other places. It operates approximately 412 units of equipment. Its revenues for 1962 were $4,500,000. Old Do-

minion submitted an exhibit showing interstate traffic handled by it during February 1963 inbound to the Norfolk area from northern points, such as New York, Philadelphia, and Baltimore, and from beyond points, received by it at Richmond from Hemingway; the total number of shipments listed is 82 and the total weight is 399,310 lbs. Outbound interstate traffic from Norfolk to Richmond was stated to be about 30 per cent of the inbound traffic. As indicated above, Old Dominion formerly was the carrier of the C.V.S.A. consolidated shipments between Richmond and Norfolk, prior to selection of Great Coastal and the establishment of the Great Coastal-Price interchange.

Blue & Gray has regular-route, general-commodity authority between Richmond and Norfolk, serving intermediate and specified off-route points. It has terminals in Richmond and Chesapeake (adjoining city to Norfolk), among other places. At the time of the hearing it was operating approximately 77 units of equipment. Its 1962 revenues were $692,000. Among other traffic studies, Blue & Gray submitted an abstract of shipments handled by it and connecting carriers between New York City, northern New Jersey, Philadelphia and Baltimore, on the one hand, and the Norfolk area on the other hand, during two weeks in May 1963; in most instances the interchange point was Richmond. Approximately 750 shipments are shown, with a total weight of 507,477 lbs.

Estes Express is authorized to serve in interstate commerce between a number of points in Virginia, including service between Richmond and Norfolk. It has terminals in Richmond and Norfolk, among other places. At the time of the hearing it was operating 123 units of equipment. Its 1962 revenues were $2,330,000. Among other traffic studies submitted, Exhibits H-55 and H-66 show interstate shipments handled by Estes Express in connection with other carriers on one day, April 15, 1963, outbound from the Norfolk area to points authorized to be served by Great Coastal and beyond points in New Eng-

land and inbound to the Norfolk area from the same points; 43 shipments are listed, from which Estes Express derived a total of $355.28 in revenue. Most of such shipments were interchanged at Richmond.

Carriers providing service between New York and Richmond and by connecting lines to Norfolk. These are Hemingway and East Coast.

As here pertinent, Hemingway has regular-route, general-commodity authority between Richmond, on the south, and Baltimore, Wilmington, Philadelphia, and New York City, on the north, serving intermediate and off-route points. It has 22 terminals, including terminals at the points named. At the time of the hearing it was operating approximately 1,604 units of equipment. Its revenues for 1962 were $20,000,000. It participates in traffic moving to and from the Norfolk area via interline with other carriers at Richmond. No traffic study with respect to such traffic, subject to diversion, was presented. As previously indicated, Hemingway was the New York-to-Richmond carrier for the C.V.S.A.-consolidated traffic for a number of years prior to selection of Great Coastal on or about March 16, 1962.

East Coast has regular-route, general-commodity authority between Richmond and New York, serving intermediate points and off-route points and areas, subject to certain restrictions. It has terminals at Richmond, Baltimore, Philadelphia, Jersey City, and New York City. At the time of the hearing, it was operating 107 units of equipment. Its revenues for 1962 were $1,564,000. It also participates in traffic moving to and from the Norfolk area via interline with other carriers at Richmond. No traffic studies were presented.

Financial Considerations

Applicants contend that the transaction is a provident one for Great Coastal, the vendee. The purchase price for

the entire Price operating rights is only $3,000, of which $1,500 has been paid. Great Coastal is financially fit, and payment of the purchase price can have no possible adverse effect on Great Coastal's financial condition. Approval of the transaction by the Commission and its consummation would permit Great Coastal to continue the transportation services heretofore performed by Price in its territory, would permit Great Coastal to continue its through movement of the C.V.S.A.-consolidated traffic from New York and Philadelphia to Norfolk with its own equipment and drivers, and, as stated by applicants on brief, "would permit Great Coastal to extend its single-line service into the Norfolk area,[40] which heretofore has been served by the vendee in a connecting-line operation only."

Applicants submitted a projected statement of income for the calendar year 1963 purporting to show the effect on Great Coastal's income and expense accounts had the considered operating rights, together with Great Coastal's other operating rights, been owned and operated by Great Coastal for the entire year 1963 (Exhibit H-21). The projected operating revenue of $1,348,833 was arrived at by adding to Great Coastal's 1962 revenue of $1,213,833 the sum of $100,000, representing revenue growth at the rate of about 9 per cent (computed from the increase of revenues for the first four months of 1963 over revenues for the same period of 1962), and the sum of $35,000, representing anticipated revenues under Price's operating rights. This latter sum of $35,000 was taken from a review of Price's revenues for the years 1958, 1959, and 1960 (see footnote 8), prior to acquisition of Price's capital stock by Nielsen-Barrett. The projected net income of $136,237, before provision for income taxes, was arrived at by computing expenses in the various expense

[40] Through "tacking" at the point of overlap previously described.

accounts at the same percentage rates as were experienced by Great Coastal in the first four months of 1963 —an overall operating ratio of 88.79 per cent. After provision for income taxes, the projected net income is $66,581. Of this amount, roughly 2.6 per cent, or $1,715, is attributable to the Price operating rights ($35,000 of revenues from the Price operating rights in relation to $1,348,833 total revenues). On the basis of realizing about $1,715 of net income, after taxes, each year, the purchase price of $3,000 would be recovered in less than two years.

In certain details the financial exhibits submitted by applicants to support the reasonableness of the purchase price might be subject to some question. Assumption of a continued growth in revenue at the rate of 9 per cent for the entire year 1963 may not be warranted from a comparison involving only the first four months of 1963 and 1962, without any showing that such a rate of growth had been achieved and sustained in previous accounting periods or a showing of reasons for believing that such rate can be sustained. Likewise, it may be optimistic to use the operating ratio of 88.79 per cent achieved for the first four months of 1963, without a similar showing. The assumption that Great Coastal would receive $35,000 in revenues from operations in Price's territory, based on Price's revenues for the years 1958, 1959, and 1960, appears somewhat arbitrary in that there was no showing that Great Coastal would engage in the type of operations from which Price derived its revenues in those years. Finally, it was indicated that Great Coastal would open and operate a terminal in Norfolk but there is no showing that the involved expenses were fully taken into account in preparing the projected statement of income.

Notwithstanding the preceding paragraph, it is amply apparent that purchase of the Price operating rights for only $3,000 would indeed be a provident transaction for Great Coastal. Great Coastal's own operations have been

profitable for several months; its operating ratio for 1962 was 97.5 per cent and for the first four months of 1963 it was a very favorable 88.79 per cent. Extension of its operating rights into the Norfolk area would undoubtedly result in additional revenues of many thousands of dollars each year, and there is no reason to believe that Great Coastal's operating ratio would worsen because of its extension into the Norfolk area. Once established in Norfolk, Great Coastal would no doubt, through tariff concurrences, connecting-line arrangements and terminal area operations, perform a large volume of transportation services within the Norfolk area. The revenues derived from the continued transportation of the C.V.S.A.-consolidated traffic into Norfolk without the necessity for an interline connection and division of revenues at Bingley Center (or at Richmond in the event of Price's demise) are relatively substantial in terms of the purchase price. Great Coastal would no doubt become an important participant in connecting-carrier transportation services between the Norfolk area and Richmond, and revenues derived therefrom would be substantial. But the most important source of additional revenues, as indicated, would be the single-line service which Great Coastal would provide between the Norfolk area, on the one hand, and, on the other, Great Coastal's northern points, as described above, including such major points as Baltimore,[41] Philadelphia, northern New Jersey, and New York City. In the light of the present volume of its traffic between such northern points and Richmond, it can be assumed that Great Coastal would soon develop a substantial volume of traffic between such northern points and the Norfolk area. Based on the above, it is concluded that Great Coastal is financially fit, that payment of the purchase price would in no wise impair its financial condition, and that the purchase price would be recovered from increased revenues within the period of a few months.

[41] See footnote 39.

Discussion and Conclusions

On brief, applicants suggest that the principal questions to be considered in determining whether the proposed purchase of the Price operating rights by Great Coastal is consistent with the public interest, in the light of analysis of many decisions of the Commission in the past and the policies which have been applied in them, are the following: (1) Is the transaction a provident one?; (2) Is there any bar to approval of the transaction by reason of lack of fitness of the vendee?; and (3) Have the Price rights been exercised actively so that the establishment of a single-line service by Great Coastal would not be tantamount to a new service? The first has been answered in the affirmative by the examiner, and no contrary contention is made by any protestant.

Fitness of Vendee. As anticipated by applicants on brief, the examiner has been requested by one or more protestants to conclude that Great Coastal is unfit to acquire the Price operating rights because of its unlawful conduct in respect of them. For their part, applicants deny any violations of laws or regulations by Great Coastal. For the reasons hereinafter indicated, the examiner does not reach a conclusion that Great Coastal is unfit. He does, however, conclude that Great Coastal has shown a disregard for provisions of laws and regulations administered by the Commission, for which it is to be censured.

It is apparent to the examiner that when Great Coastal began the through movement of the C.V.S.A.-consolidated traffic with its equipment and drivers, it yielded to expediency so far as full compliance with both the technical requirements and the purpose and intent of the lease regulations is concerned. The purpose and intent of the leasing regulations is to give effect to "the basic proposition that a motor carrier receiving traffic from another through interchange of equipment with drivers must have and exercise control over the operation of such equipment while

it is in its possession. A mere paper agreement saying that control is vested in the connecting carrier is not enough; the carrier under whose rights the interchange equipment is operated must in fact control the service to the same degree as it would if it was the owner of the vehicles, and must control the vehicles to the extent necessary to assume full responsibility to the shipper, to the public, and to this Commission for the transportation performed in such vehicles."[42] Failing a transfer of dominion and control, the onward transportation by the alleged lessor is unlawful, and the underlying arrangement must be regarded as one for the lease of operating rights in violation of section 5(4) of the act.

With respect to the technical requirements, Great Coastal was as fully responsible as Price for the selection of Damion's Service Station as the interchange site, and it is difficult to believe that Great Coastal was not aware that such site is in fact more than five airline miles from the Newport News city limits.[43] Moreover, as stated above, it is clear that the interchange operation was set up for the through movement of the traffic by Great Coastal with minimum participation by Price. The examiner is convinced[44] that for a period of time prior to April 1963 the

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[42] Quotation is from *Stewart—Investigation of Control,* 87 M.C.C. 681, 696. See also *Vance Trucking Co., Inc.—Pur.—Northern Neck Transfer,* 86 M.C.C. 545, 548-549; *Performance of Motor Com. Car. Service by Riss & Co., Inc.,* 48 M.C.C. 327,360.

[43] Certainly Great Coastal could not with impunity accept Nielsen's estimate that Damion's Service Station is 4½ miles from the Newport News city limits. Although both Estes and Nielsen testified that the propriety of the site was discussed with a District employee of the Commission and affirmed after reference to a map, it does not appear that the exact location of the service station could have been correctly pinpointed on the map.

[44] Based on the record and taking into account the circumstances and also the testimony, demeanor and responsiveness of applicants' witnesses.

Price participation was indeed minimum, with such safety inspection, execution of documents, etc., as was done being performed on many occasions by personnel of Damion's Service Station. With respect to the substance of the regulations, under the conditions which obtained it is difficult to credit Great Coastal with a belief that it was in fact transferring dominion and control of the equipment, drivers and lading to Price. Inasmuch as Great Coastal is chargeable with a knowledge and understanding of the purpose and intent of the leasing regulations, as well as their technical requirements, the examiner is constrained to conclude that Great Coastal in its conduct of the lease operation with Price has shown a disregard for the laws and regulations administered by the Commission, for which it deserves consure.[45]

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[45] As it will appear, the examiner's recommendation for the disposition of this proceeding does not turn on the existence or nonexistence during a particular period of time of violations of law and regulations on the part of Great Coastal or Price in their conduct of the lease operation, and no finding of violation is reached. In this connection, a finding of violation would have to be supported by findings of fact describing the actions of the parties during a particular time period. Here the parties were engaged in different actions at different times. Viewed at a particular time it could be concluded that the arrangement was being used as a device to lease Price's operating rights, but viewed from beginning to end the conclusion is not sustained. It is not contended that the arrangement was unlawful *ab initio*, including the period immediately after commencement when Price furnished tractors and drivers (except that witness Nielsen testified that from the beginning Damion's Service Station was the interchange site—contradicted by witness Estes). While it appears that there were violations of specific provisions of the leasing regulations during the period of minimum participation by Price, the record contains no detailed proof or admission of this (apart from location of the interchange site and absence for a short period of a tariff, as to which there are mitigating circumstances). Some recognition must be given to the corrective action taken in conjunction with a review of the operation by District employees of the Commission.

The examiner is not unmindful that there were a number of unusual factual circumstances present, including the loss by Price of all its equipment and employees (other than Nielsen) after the interchange was commenced. Such circumstances, however, do not justify yielding to expediency, and disregard for Commission regulations is not to be condoned. On the other hand, the record shows that conferences were held with District employees of the Commission concerning the interchange operation. The record further shows that following such a conference, on or about mid-April 1963, corrective action was taken by Great Coastal and Price to give effect to specific suggestions made, which it can be assumed were designed to bring the parties into compliance with applicable regulations. The examiner takes official notice that no enforcement action of record has been taken by the Commission against Great Coastal involving alleged violations of any of the rules and regulations promulgated by the Commission. No finding of violations is reached in the present proceeding (see footnote 45). Accordingly, no bar to approval of the transaction by reason of lack of fitness of the vendee is found.

Service Considerations. Applicants urge an affirmative answer to the third question they have suggested, "Have the Price rights been exercised actively so that the establishment of a single-line service by Great Coastal would not be tantamount to a new service?" In support they contend that Price has continuously and actively utilized its rights to effect the transportation of freight in interline service, not only with Great Coastal but also with other carriers; that acquisition of the Price operating rights by Great Coastal would result in a mere substitution of service; that unification of the Price operating rights with those now held by Great Coastal would result in a new service "only to the extent that there would be eliminated the necessity for interchange of shipments and equipment," which is not sufficient to warrant a conclusion that a new service would be enabled by the trans-

action; and that there has been shown no potentiality of a harmful adverse effect upon the protestants, all of whom are substantial carriers well-established in their respective territories (citations omitted).

Protestants assert that the certificated rights of Price have become substantially dormant and that the evidence of shipments transported submitted for Price fails to show more than inconsequential use of them. They assert that neither Price nor Great Coastal has participated in traffic moving between Great Coastal's authorized territory and the Norfolk area with any competitive impact, either by interline connection with each other or with other carriers, and that acquisition of the Price operating rights by Great Coastal would definitely result in a new and different service. With respect to such new and different service, they assert that applicants have failed to show any public need for extension of Great Coastal's operations into the Norfolk area or that the motor common carrier services now being provided in the Norfolk area would result in substantial diversion of traffic from protestants and would materially adversely affect their operations and services. The examiner concludes that protestants' contentions are for the most part supported by the weight of the evidence.

a. Alleged dormancy.

Vendor's operations under its certificated rights have been examined above. As stated in applicant's brief, Price's participation in interstate shipments has been dependent upon the willingness of other carriers to do business with it. More accurately, Price's participation in interstate shipments for the period covered by its abstract of shipments, September 1961 through May 1963, has been dependent upon the willingness of other carriers to give business to Price, for it does not appear that Price generated any of the approximately 1,353 shipments shown, 1,306 of which were inbound.

Excluding for the moment the 866 inbound shipments shown as received from Price and Morton, protestants assert that substantially all the remaining 440 inbound shipments were received in Norfolk for delivery within the commercial zone and terminal area of Norfolk and most of these were not true interline shipments. The 215 shipments received from Springmeier were not interline shipments but instead were shipments delivered by Price as cartage agent for a freight forwarder. Likewise the 20 shipments listed as being received from the Norfolk & Western Railway were not interline shipments but were freight cars from which Price made deliveries under contract with the meat-packer shipper. The 180 shipments given to Price by Turner's Express between September 30 and October 3, 1961, during a strike of the latter's teamster employees, were turned over to Price in Norfolk for delivery mostly in the Norfolk commercial zone on a per-hundred weight basis, and as such cannot be considered as true interline shipments. In sum, protestants contend, under the circumstances of receipt the transportation of most of the above shipments was performed under the commercial zone and terminal area exemptions of the act, and not under Price's certificated operating rights.[46] With

[46] On brief, counsel for Turner's Express contends that all shipments handled by Price which could be performed without certificated authority are properly excludable from consideration because Price could continue to perform such transportation even after sale of its operating rights to another carrier, and the Commission has consistently held that it will not permit a vendor to transfer rights where the traffic will be retained. Citing *Shoe City Exp. Co., Inc.—Purchase—Marshall,* 45 M.C.C. 778; *Ballard & Skellet Van Lines, Inc.—Consolidation,* 58 M.C.C. 539, and *Arkansas Exp., Inc.—Purchase—Patterson Transfer Co.,* 56 M.C.C. 460. In the present case, Price's condition would appear to exclude any possibility that it would be able to continue any operations within the Norfolk commercial zone and terminal area after sale of its certificated operating rights. But the principle is nevertheless applicable.

respect to the remaining shipments, admittedly the evidence does show that on a number of occasions Price did participate in true interline shipments with other carriers, destined to representative points within its territory, but protestants contend that the volume of such service cannot be regarded as substantial.

With respect to the approximately 700 shipments shown as received by Price from Great Coastal in the period between April 1962 and May 1963, protestants assert that for purposes of determining past utilization of vendor's rights little or no credit should be given to Price for these shipments, for three principal reasons: First, although a carrier is entitled to build up its operations, even in anticipation of sale of its operating rights, where this is done principally through the aid and assistance and under the control, dominion, or influence of the prospective vendee, the shipments involved are entitled to little weight in negating dormancy. See *Aero Trucking, Inc.—Pur. (Portion)—Kreitz,* 93 M.C.C. 115; *Dallas & Mavis Forwarding Co., Inc.—Pur.—Billy Baker Co.,* 87 M.C.C. 527; *Cooper M. Lines, Inc.—Purchase—Parrish Dray Line, Inc.,* 58 M.C.C. 283; *Deaton Truck Line, Inc.—Pur.—Magnolia Truck Line,* 87 M.C.C. 674; *Pilot Freight Carriers, Inc.—Pur.—Bison Fast Freight,* 90 M.C.C. 709; and others. Here, the movement of the traffic, all generated by Great Coastal, started after the Price rights were available for purchase and only a few months before purchase negotiations with Great Coastal admittedly began; the through-movement of the traffic was from the beginning subject to the control, dominion or influence of Great Coastal; and the movement began and was continued under circumstances which make it reasonable to believe that the parties formed an early intention of purchase of the rights by Great Coastal. Second, it is well established that shipments handled in an unlawful manner may not be given any weight in support of applicant's position. *Vance Trucking Co., Inc.—Pur.—Northern Neck Transfer,* 87

M.C.C. 545; *Stewart—Investigation of Control,* 87 M.C.C. 681; *Pilot Freight Carriers, Inc.—Pur.—Bison Fast Freight, supra.* Here, according to the testimony of witness Nielsen, all the traffic was interchanged at an unauthorized point, namely, Damion's Service Station. For a period no tariff was on file. But more importantly, commencing with the time that Price no longer could furnish tractors or drivers, the Price participation was so minimum that it must be considered that the rights of Price were being unlawfully leased and operated by Great Coastal. Inasmuch as the Price-Morton arrangements were very similar to the Price-Great Coastal arrangements, nearly all the shipments being transported after Price no longer had any equipment or drivers, this principle is applicable as well to the 186 shipments shown on the abstract as received from Morton. And third, in any event, the volume and nature of this traffic is such that at best it reflects but a very limited utilization of Price's operating rights. Starting in August 1962 the volume of traffic handled through the Price-Great Coastal arrangement averaged only about one trailer-load per week day and, except for 13 truckload shipments in 1963, consisted entirely of the C.V.S.A.-consolidated shipments inbound to a cartage agent in Norfolk. Stated differently, since August 1962 the Price-Great Coastal interchange traffic has consisted, for all practical purposes, of about one trailer-load per week day transported for one shipper in one direction and delivered to only one point in Price's territory. Likewise, the shipments received from Morton were infrequent trailer-loads of inbound shipments transported in one direction and delivered to only one point in Price's territory, namely, a cartage agent in Norfolk. After mid-September 1962 (except for four shipments in November 1962), the only shipments transported under Price's operating rights were those shown as received from Morton and Great Coastal.

The examiner does not reach the conclusion that the operating rights of Price are dormant, or substantially

dormant, as this term has been applied by the Commission in proceedings under section 5 involving the disposition of irregular route authority.[47] In the present case the record shows that upon assuming management of Price in February 1961, Nielsen sought to expand its operations as best he could under the circumstances, taking such steps as causing Price to become a member of the Middle Atlantic Conference tariff and soliciting interline business from other carriers. It is not contended that Nielsen abandoned his efforts to obtain business for Price, at least not until the time (December 1962, after negotiations for sale of Price's operating rights to Great Coastal had been completed) that Price no longer had available any equipment, terminal, office, or other employees, by reason of its financial difficulties. So far as obtaining interstate business is concerned, involving participation in interline shipments with other motor carriers, it must be concluded that Nielsen was not very successful. Of the 1,353 shipments listed on Price's abstract of shipments covering the period September 1961 through May 1963, only 463 were received from carriers other than Great Coastal and Morton. Of the latter, the examiner agrees that the shipments shown as received from Springmeier and the Norfolk & Western Railway and most of those received from Turner's Express are to be excluded from consideration in determining past utilization of Price's certificated rights, for the reasons advanced. With respect to the 890 shipments received from Great Coastal and Morton, the examiner appreciates the cogency of the arguments made. However, the record will not support findings that Great Coastal became the prospective vendee of the Price rights until November 1962; that Price came under the dominion, control or influ-

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[47] See *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc.*, 75 M.C.C. 659, 666. Also, *U.S.* v. *Caroline Freight Carriers Corp.*, 315 U.S. 475; *Branch Motor Exp. Co.—Control—Morgan Trucking Co.*, 93 M.C.C. 244; *Central Wisconsin M. Transport Co.—Purchase—Carlstedt*, 85 M.C.C. 305.

ence of Great Coastal until about this time; that the interchange arrangement was unlawful *ab initio;* or that all shipments after Price no longer could furnish equipment or drivers were handled in an unlawful manner (apart from certain technical violations of applicable regulations, as to which there are mitigating circumstances). Accordingly, Price is credited with a large number of the shipments shown as interlined with Great Coastal and Morton.[48] These together with the other interline shipments in which Price admittedly did participate, serving representative points within its territory, are sufficient to preclude a finding that Price's operating rights are dormant. At the same time, however, the examiner agrees that the volume and nature of service rendered by Price in recent months reflect but a very limited utilization of its certificated rights.

b. New service.

The record does not show any participation by Price, previous to establishment of the connecting-line arrangement with Great Coastal, in traffic moving between the Norfolk area and Great Coastal's authorized points of service. Likewise, the record does not show that Great Coastal participated to any substantial extent, previous to establishment of the connecting-line arrangement with Price, in traffic moving between Great Coastal's authorized points of service and the Norfolk area. Stated differently, neither Price nor Great Coastal had been a competitive factor in traffic moving between their respective territories. Thus, the Great Coastal-Price interline movement of traffic which began in April 1962, as described herein, was a new competitive service which had not theretofore been faced by existing common carriers providing either single-line or connecting-line service to the Norfolk area from

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[48] See *Midwest Transfer Co. of Ill.—Control—Chamberland's,* 90 M.C.C. 503, 508.

the points which Great Coastal is also authorized to serve. As described above, however, the volume of this new competitive service has not been large; further, it has been very limited in nature, consisting largely of shipments transported for one shipper in one direction. If approval of the proposed transaction would have only the effect of allowing Great Coastal to continue moving traffic into Norfolk of this nature and volume, it is unlikely that the application would be so vigorously opposed by so many protestants.

In contending that the acquisition of the Price operating rights would be a provident transaction, Great Coastal refrained from anticipating that it would develop any large volume of traffic between its present authorized territory and the Norfolk area. In the discussion of the purchase price, however, the examiner concluded that once Great Coastal is established in Norfolk, as it now is in Richmond, it can be assumed that it would soon be deriving substantial revenues from transportation services between its northern points, including such major points as New York City, Northern New Jersey, Philadelphia, and Baltimore on the one hand, and, on the other, points in the Norfolk area. Great Coastal is now transporting a heavy volume of traffic between such northern points and Richmond and there is no reason to believe that it will not develop a substantial volume of traffic into and out of the Norfolk area. Because it has not participated in traffic moving between its present authorized points and the Norfolk area, to any appreciable extent, it is held that approval of the proposed transaction would result in a new and additional competitive service (as opposed to mere substitution of service or improvement of an existing service). The result would not be distinguishable in substance from the result of an extension of Great Coastal's service into the Norfolk area through securing new operating authority.

c. Need for and effect of new service.

Where approval of an acquisition would result in the institution of a new and additional competitive service by the vendee, the ultimate issue for consideration in determining consistency with the public interest[49] is whether benefits accruing to the public would outweigh possible harmful effects upon the carriers serving the area involved.[50] Factual issues are the adequacy or inadequacy of existing transportation services, the need for new and additional service, and whether the new and additional competitive service would adversely affect to any substantial degree the continuance, efficiency and economy of existing carrier services.

Consistent with applicant's position on brief that acquisition of the Price operating rights by Great Coastal would result only in a mere substitution of service and unification would result in a new service "only to the extent that there would be eliminated the necessity for interchange of shipments and equipment," the evidence submitted by appli-

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[49] Consistency with the public interest "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for and best use of transportation facilities." *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25. "Such a concept obviously embraces the interest of competing carriers as well as that of shippers and consignees." *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M.C.C. 467, 470; *Shein's Exp.—Purchase—Central Jersey Motor Lines, Inc.*, 59 M.C.C. 534.

[50] *Bowman Transp., Inc.—Control and Merger*, 93 M.C.C. 133; *Barber Transp. Co.—Purchase—Conner*, 90 M.C.C. 475; *Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc.*, 90 M.C.C. 303; *Deaton Truck Line, Inc.—Pur.—Magnolia Truck Line, supra; Boyd E. Richner, Inc.—Purchase—Rust*, 87 M.C.C. 205; *Consolidated Freightways, Inc.—Control—Silver Fleet*, 85 M.C.C. 139; *Interstate Motor Freight System—Control—Moskowitz*, 75 M.C.C. 607.

cants to show public need was quite limited. It consisted of testimony of two Norfolk members of the C.V.S.A. and an employee on Montgomery Ward & Co., examined above under the heading "Consignee Support." The latter witness expressed a desire to receive overnight service on infrequent shipments from the New York City area, which he stated was not being received, but he was not acquainted with present or feasible transit times with respect to less-than-truckload shipments, and his testimony has no probative value. The two C.V.S.A. members expressed satisfaction with the consistent overnight service being received from the Great Coastal-Price combination with respect to the C.V.S.A. consolidated shipments from New York and Philadelphia, but it cannot be inferred from their testimony that existing carriers serving Norfolk are not ready, willing and able to provide equally good service. No evidence was offered by applicants to the effect that existing transportation services in the Norfolk area are inadequate or unsatisfactory or that existing carriers are not equipped to handle all available traffic efficiently and economically. Should the present application be denied, it is not likely that the public would be deprived of the limited services performed during recent months under Price's operating rights, for it can be assumed that arrangements would be made for their continued performance. It is concluded that applicants have not made a sufficient showing that benefits would accrue to the public from approval of the proposed transaction.

Under the heading "Protestants," the evidence of the opposing carriers was briefly reviewed. In sum, such evidence shows that all of them are substantial, established motor carriers which have invested considerable money in equipment and facilities to enable them to provide adequate, safe, efficient and economical transportation services to the public as authorized by the Commission. Based on the record, and in the absence of evidence to the contrary,

the examiner will conclude that individually and collectively they are providing adequate service to shippers and consignees in their respective areas of operation, that they desire and are equipped to handle additional business, and that any substantial loss of traffic would materially and adversely affect the continuance, efficiency and economy of their existing carrier services to the detriment of the public. All of them introduced evidence showing that the new and additional service which approval of the proposed transaction would enable Great Coastal to provide would be competitive with their present services; and most of them submitted specific evidence as to the amounts of their traffic which would be susceptible to diversion by Great Coastal. The amount of traffic vendee would divert from the opposing carriers is problematical and not subject to exact determination, but with no new sources of traffic shown to be available it can only be concluded that it would be substantial. The examiner finds that extension of Great Coastal's operations into the Norfolk area would disrupt the competitive balance with harmful effect on competing carriers and would not foster sound economic conditions in the industry.

It is concluded that the unfavorable impact upon existing motor carriers and the public is not outweighed by any benefits which would accrue to the public.

The examiner has fully considered the various contentions and requested findings of the parties and, except to the extent indicated, finds that they should not alter the ultimate findings and order herein.

Ultimate Findings and Order

The examiner finds that the purchase by Great Coastal Express, Incorporated, of the operating rights of Price Transfer Company, Inc., and the acquisition by C. E. Estes of control of such rights through the purchase have

not been shown to be consistent with the public interest and the application, accordingly, should be denied.[51]

Premises considered, it is the ORDER of the examiner that:

The application be, and it is hereby, denied.

This order shall become effective on the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Ninety days from the effective date of this order, the order entered June 13, 1963, as extended by order entered November 13, 1963, authorizing the lease by Great Coastal Express, Incorporated, of the operating rights of Price Transfer Company, Inc., shall be of no further force or effect.

By the Commission, Louis W. Sornson, Hearing Examiner.

Dated at Washington, D. C., this 2nd day of March, A.D. 1964.

HAROLD D. McCOY
Secretary

(SEAL)

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[51] Consideration has been given to approval of the acquisition by Great Coastal of the Price operating rights subject to a restriction against joinder or tacking, i.e., a restriction which would preclude single-carrier through-service by Great Coastal between any of the points named in the Price operating rights, on the one hand, and, on the other, any of the points or places specified in the other operating rights possessed by Great Coastal. However, this would defeat the purpose of the application as presented to the Commission, and no showing was made that approval of the transaction subject to such a restriction would be consistent with the public interest. Accordingly, the examiner finds that the application should be denied, even were approval of the transaction to be subject to a restriction of the nature described.

APPENDIX D

SERVICE DATE
December 18, 1964

Decision and Order

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 14th day of December, A.D. 1964.

No. MC-F 8338

GREAT COASTAL EXPRESS, INCORPORATED—PURCHASE—
PRICE TRANSFER COMPANY, INC.

Upon consideration of the application and the record in the above-entitled proceeding, including the report and order of the hearing examiner, served April 3, 1964, the exceptions thereto filed by the applicants and by protestant, Adley Corporation, doing business as Adley Express Company, and the replies of the applicants, Adley, and Turner's Express, Inc., protestants, and

It appearing, That the findings and conclusions of the hearing examiner with respect to all matters of fact and law considered and disposed of in his report are, in all material respects, proper and correct; and that the exceptions of the parties and the replies thereto raise no new or material matters of fact or law not adequately considered and properly disposed of by the hearing examiner in his report; and that the exceptions and replies are otherwise not of such nature as to require the issuance of a report by Division 3 discussing the evidence in light of such pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the replies thereto does not warrant a different result from that rendered by the hearing examiner; that the statement of facts and conclusions and the

findings of the hearing examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own:

It is ordered, That the order of the hearing examiner served April 3, 1964, recommending denial of the application, be, and it is hereby, adopted as the order of the Commission, Division 3, effective 20 days from the date of service hereof.

By the Commission, Division 3.

HAROLD D. McCOY
Secretary

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, TURNER'S EXPRESS, INCORPORATED, and THE ADLEY CORPORATION, D/B/A ADLEY EXPRESS COMPANY, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

MOTION TO AFFIRM

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Attorneys for Appellees,
Turner's Express, Incorporated
The Adley Corporation, d/b/a
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Of Counsel:

MACDONALD & MCINERNY

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, TURNER'S EXPRESS, INCORPORATED, and THE ADLEY CORPORATION, D/B/A ADLEY EXPRESS COMPANY, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

---

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Turner's Express, Incorporated, and The Adley Corporation, d/b/a Adley Express Company, move that the judgment of the District Court be affirmed.

STATEMENT

This is a statutory appeal from the judgment of a specially constituted three-Judge District Court dismissing a complaint to set aside an order of the Interstate Commerce Commission. The Commission order denied the application of Great Coastal Express, Incorporated (Great Coastal), to purchase the operating rights of Price Transfer Company, Inc. (Price), filed and considered under Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. s. 5(2)(a)), on a finding that approval would not be consistent with the public interest.

Great Coastal sought to purchase the operating rights of Price authorizing transportation of general commodities, with exceptions, over irregular-routes between Norfolk, Va., and seven other nearby Virginia cities (J.S. 9a). Great Coastal's present rights authorize transportation of general commodities, with exceptions, over irregular-routes, between, as here material, points in James City County, Va., on the one hand and on the other, points in New Jersey within 20 miles of Newark, N. J., points in the New York, N. Y., Commercial Zone, points in Fairfield County, Conn., and points in New York, New Jersey, Pennsylvania, Delaware and Maryland north of Baltimore, Md., on specified highways between Baltimore, Md., and New York, N. Y. (J.S. 8a).

Purchase of the Price rights by Great Coastal would enable Great Coastal to institute a direct single-line service between New York City, northern New Jersey, Philadelphia and Baltimore on the one hand, and on the other, points in the Norfolk area (J.S. 40a) in direct competition with Turner's Express, Incorpo-

rated, which derives an estimated 90% of its gross revenues of $1,371,000 annually from such operations and in competition with Adley which derives nearly $800,000 annually from such operations (J.S. 22a, 23a).

The application was denied for the reasons that it would result in a new and additional competitive service (J.S. 40a), that applicants did not make a sufficient showing that benefits would accrue to the public from approval of the proposed transaction (J.S. 42a), that extension of Great Coastal's operations into the Norfolk area would disrupt the competitive balance with harmful effect on competing carriers and would not foster sound economic conditions in the industry (J.S. 43a), and that the unfavorable impact upon existing motor carriers and the public is not outweighed by any benefits which would accrue to the public (J.S. 43a).

The foregoing bases for the Examiner's recommended denial of the application were adopted by the Commission (J.S. 45a, 46a), and the Court below sustained the Commission in a per curiam decision (J.S. 1a-4a).

ARGUMENT

This appeal fails to state any substantial question warranting consideration by this Court.

1. Appellants argument that the Commission has applied a new and unlawful standard of proof in considering the nature of Price's operations earlier than six months prior to the filing of the application is without merit since the Commission's form of application, requiring the submission of evidence of operations for the six-month period preceding the filing of the application does not establish an inflexible rule con-

cerning duration of operations, but is merely a minimum prerequisite for filing and consideration of the application, and a guide to assist the applicants in meeting their burden of proof, *Dennis Trucking Co., Inc.—Control—Johnsons Transfer,* 70 M.C.C. 741 (1957), and this principle was recognized by the appellants themselves in submitting to the Commission evidence of operations for a period of nearly twenty-one months, September 5, 1961 through May 31, 1963 (J.S. 18a).

2. Appellants suggest that the Commission erred in finding that approval of the application would result in a new competitive service since it was found that a new competitive service had been established by appellants nearly eight months before the purchase contract was negotiated (J.S. 10). While appellants had it within their power to institute a new service, and thereby created evidence, and did in fact institute, in one sense, a new service eight months prior to signing the contract, approval of the application would nevertheless result in the institution of a completely new service, different from that previously conducted. Great Coastal had never been a competitive factor in the transportation of traffic between the points involved and on that dispositive issue the Examiner found (J.S. 40a):

> "Because it has not participated in traffic moving between its present authorized points and the Norfolk area, to any appreciable extent, it is held that approval of the proposed transaction would result in a new and additional competitive service (as opposed to mere substitution of service or improvement of an existing service). The result would not be distinguishable in substance from the result of an extension of Great Coastal's service

into the Norfolk area through securing new operating authority."

3. The Commission has applied the standards prescribed in the statute with reason and care. The findings of fact made in support of the Commission's ultimate conclusion are in turn fully supported by the record evidence.

CONCLUSION

This appeal involves no substantial question warranting plenary consideration by this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees,
Turner's Express, Incorporated
The Adley Corporation, d/b/a
Adley Express Company

Of Counsel:
MACDONALD & MCINERNY

CERTIFICATE OF SERVICE

In compliance with Rules 13(2) and 33(1), (2) and (3-b) of the Revised Rules of the Supreme Court of the United States, I, Francis W. McInerny, one of the attorneys for the appellees Turner's Express, Incorporated and The Adley Corporation, d/b/a Adley Express Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as indicated below.

This, the 17th day of November, 1965.

FRANCIS W. MCINERNY

Copies served in duly addressed envelopes with first class postage prepaid:

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED, AND PRICE TRANSFER COMPANY, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This case involves the application, pursuant to Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. 5(2)(a)), of Great Coastal Express, Incorporated ("Great Coastal"), to purchase the motor carrier

795-845—65

operating rights of Price Transfer Company, Inc. ("Price"). The Commission denied Great Coastal's application, and the denial was affirmed by a three-judge district court.

Price's interstate operating certificate authorized it to service the Virginia cities of Newport News and Norfolk (J.S. 2a, 9a). Great Coastal holds motor carrier operating certificates for the transportation of general commodities between New York City and intermediate locations on the one hand and several points in Virginia on the other (J.S. 2a, 8a). However, Great Coastal's authorization does not permit it to enter the Norfolk-Newport News commercial area (J.S. 8a).

In April 1962, Great Coastal and Price began to interchange commodity shipments destined to the Norfolk area (J.S. 11a–15a). Great Coastal carried the freight to a point near Newport News, and Price completed the haul into Newport News and Norfolk (J.S. 12a). Subsequently, Great Coastal agreed to buy Price's operating rights and, in January 1963, it submitted its purchase application to the Commission (J.S. 7, 6a). The Commission granted Great Coastal's request for authority to lease Price's rights pending disposition of the application. Under this temporary authority, Great Coastal provided, for the first time, single-line service from New York to the Norfolk-Newport News area (J.S. 3a, 40a).

The Commission examiner, after a full hearing, determined that the combination of Great Coastal's rights with Price's operating rights would result in a

service substantially different from that which had previously been performed under the separately operated certificates. He found that Great Coastal and Price had not participated in substantial traffic movements to Norfolk after their 1962 agreement and that, consequently, approval of the application would result in an additional competing service rather than in a substitution or improvement of existing services (J.S. 38a–40a). The examiner also found (1) that existing carriers are providing adequate single or connecting-line service to shippers in the Norfolk area (J.S. 43a); (2) that any substantial loss of traffic would adversely affect the efficiency of their existing services to the public's detriment (J.S. 43a); and (3) that extending Great Coastal's operations would "disrupt the competitive balance with harmful effect on competing carriers and would not foster sound economic conditions in the industry" (J.S. 43a). He concluded that any public benefits which might accrue from the transfer were outweighed by the unfavorable impact upon carriers currently authorized to provide service to the Norfolk area (J.S. 43a). Upon consideration of the record and the examiner's report, the Commission agreed that the application should be denied (J.S. 45a–46a). The district court sustained the Commission's findings and conclusions (J.S. 2a–4a, 243 F. Supp. 943).

ARGUMENT

The decision below is correct and presents no question warranting plenary review by this Court. The Commission's overall governing standard turns on whether the combination of two distinct operating au-

thorities would substantially change the prior pattern of service so as adversely to affect the operations of existing carriers. *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J.), affirmed, 343 U.S. 944; *Falwell* v. *United States,* 69 F. Supp. 71, 76 (W.D. Va.), affirmed, 330 U.S. 807. In making that determination, the Commission customarily reviews the seller's volume of shipments prior to submission of the application for purchase. If it finds that the service was not dormant, it determines whether or not the acquisition would benefit the public. *Houff Tansfer, Inc.* v. *United States,* 105 F. Supp. 851 (W.D. Va.); *Bowman Transportation, Inc.—Control and Merger,* 93 M.C.C. 133; *Pacific Intermountain Express Co.—Control and Purchase,* 57 M.C.C. 467. The Commission here agreed that Price's certificate was not dormant. It also found, however, that the volume and nature of Price's recent service reflected a very limited use of its operating rights (J.S. 38a–39a), and that even after it had begun to interchange shipments with Price, Great Coastal had not participated to any appreciable extent in traffic moving between its authorized points and the Norfolk area (J.S. 40a). Accordingly, the Commission determined that approval of the application would, by greatly expanding the existing use, result in a substantially new competitive service. This conclusion was not inconsistent with prior Commission decisions. The cases cited by appellants (J.S. 11f) demonstrate that dormancy for the six-month period prior to the application is a factor militating against approval of an application; they

do not establish the converse—*i.e.*, that evidence of use entitles the applicant to consummate the proposed acquisition. Where, as here, the nature and quality of anticipated use is likely to differ substantially from existing use, it is appropriate for the Commission to consider the application in light of this change.

The court below found that there was also sufficient basis for the Commission's appraisal that the public interest would be adversely affected by the authorization of an additional motor carrier service to the Norfolk area. It correctly observed that such a determination should not be upset unless it is without evidentiary support or is unsound in law. *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 126.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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NOVEMBER 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

REPLY TO MOTIONS TO AFFIRM

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Dated: December 7, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 667

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

---

REPLY TO MOTIONS TO AFFIRM

STATEMENT

In response to the Jurisdictional Statement filed by appellants October 18, 1965, two Motions to Affirm were filed, one by appellees United States of America and the Interstate Commerce Commission and another by appellees Turners Express, Incorporated, and the Adley Corporation d/b/a Adley Express Company.

Appellants' reply to these motions follows. The facts will not be repeated herein, as they are extensively discussed in the Jurisdictional Statement.

ARGUMENT

Both Motions advance the thesis that the Commission was justified in its determination that the proposed purchase of the Price Transfer Company, Inc. [Price Transfer], motor carrier operating rights by Great Coastal Express, Incorporated [Great Coastal], would result in the institution of a new service for which public need must be shown. These Motions do no more than repeat substantially what was said in the Hearing Examiner's Recommended Report which was adopted by the Commission as its own.

To the Appellants' argument that the Commission applied a new and different standard the appellees offer little which would suggest that the Commission did not apply a different yardstick to this case. Both Motions acknowledge that the Commission found that the rights of Price Transfer were not dormant. However, neither Motion acknowledges what is plainly found and succinctly stated in the Examiner's Recommended Report—that when the Great Coastal-Price Transfer interline arrangement began in April, 1962, a new competitive service was initiated, one which existing carriers had not theretofore encountered (J.S. 39a-40a).

In their Motion at page four the carrier appellees make the assertion that "* * * Great Coastal had never been a competitive factor in the transportation of traffic between the points involved. * * *" This statement is quite contrary to the express finding of the Commission.

Obviously it is this express finding that appellees do not wish to recognize. Its significance stems from the fact that the Commission has always held the view that where a service has become competitive over a substantial period of time—a substantial period of time traditionally being the six months preceding execution of the sales contract—competing carriers have adjusted to the resulting service so that there is no basis for a finding that a new service would result from approval, or, therefore, that a joinder of rights would adversely affect existing carriers. Stated differently the Commission has always found that a service which is admittedly competitive cannot be a new service. This principle is in the clearest terms set forth in the following passage from *The Santa Fe Trail Transportation Company—Purchase (Portion) —Santa Fe Transportation Company,* 90 M.C.C. 123, 128 (1962).

> "* * * Thus, the changed competitive situation, whether actual or still potential, opposed by protestants, already exists, and, since operations conducted under unified rights cannot lawfully exceed the scope of operations that was permissible under the rights in separate ownership, it follows that the unification of the rights of vendor with those now held by vendee, would have little or no effect on the existing situation . . ."

Nor is there any evidence cited in the Examiner's Recommended Report which could lead to the conclusion that the service contemplated by the vendee subsquent to approval of the transaction would differ materially or be substantially greater in scope than that conducted during the eight-month period that the parties provided a joint line service prior to negotiat-

ing the purchase contract. No evidence was presented or discussed by the Commission which establishes that any diversion of traffic from protestants occurred, and there was no support for a conclusion that diversion of traffic would occur subsequent to an approval of the sale. Accordingly, any effort to justify the finding that a new competitive service would result from approval must fail. What is presented is a case in which the joint-line service conducted prior to the sale transaction was not dormant, was, in fact, competitive, and was not shown to have diverted traffic from other carriers.

Despite this the Commission applied a standard it had never utilized before. The Jurisdictional Statement sets forth the Commission's error in the briefest terms (J.S. 10).

> "In the instant case, the Commission made a specific finding that the appellants had provided a competitive service through interline for a period of nearly eight months prior to the signing of the contract of sale, i.e., that a competitive service had already been established by plaintiffs nearly eight months before the purchase contract was negotiated. Stated otherwise, the Commission made a finding which—by those standards consistently and traditionally applied by it—completely foreclosed any conclusion that a new competitive service would stem from approval of the proposal."

Having applied a standard which is clearly contrary to precedent the Commission must set forth its reasons for doing so which, as outlined in the Jurisdictional Statement, it utterly failed to do.

CONCLUSION

The Motions to Affirm should be denied and the questions presented in the Jurisdictional Statement should be given plenary consideration with briefs and oral argument.

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Dated: December 7, 1965

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